and true." Then again, in this country at least, the opinion of the whole court is, as a rule, written by one of its members, whereas the jurors are required to state their conclusions *seriatim*. Whatever be the explanation, the usage is as Chief Justice Blake has found it, and though not a subject of great weight as a matter of law, it is still interesting as a legal curio.

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THE TILDEN WILL CASE. — The final decision of the famous Tilden will case in the New York Court of Appeals is suggestive, not only as an addition to the list of bad wills of well-known lawyers, but also as emphasizing one of the weaknesses of the New York law. Mr. Tilden left the bulk of his property to his executors, in trust to turn it over to the Tilden Trust, an institution to be incorporated for the purpose of building a free library, and for such other educational and scientific purposes as they thought best. The amount to be given to the Tilden Trust was in the discretion of the executors, and the giving of any depended on their approval of the corporation when formed.

The court refuses to find a trust, for lack of a certain beneficiary. It is not denied that a valid bequest may be made to a corporation to be created after the death of the testator; but the rights of the corporation must begin at once on its creation; it is the discretion in the executors here that invalidates the trust. New York knows nothing of the *cy-près* doctrine, which elsewhere upholds charitable bequests when no beneficiary is named.

Three kindly judges out of seven manage to dissent on the ground that the section giving to the executors power to give to general purposes, should they fail to approve the Tilden Trust, is void, and that therefore the former section stands as a valid trust. This ground of construction does not, of course, touch the general question of law.

Besides the obvious slur the facts of this case throw on the general policy of discarding the *cy-près* doctrine, they give an opportunity to deplore the fact that what might be called the *laissez-faire* doctrine is not more widely applied in cases of attempted trusts. The property is given to the executors. The equitable rights of the next of kin, like all constructive trusts, rest purely on ideas of natural justice, and it certainly seems as though the interference of equity to set aside the legal title is uncalled for, except when the failure of the testator's object gives the next of kin a right in justice to complain. When the donees, as in this case, are willing to fulfil the testator's wishes, it seems as though equity, in interfering to prevent their action, is converting a regulating principle which depends for its life solely on natural justice into a positive rule having no defence either in policy or in principle. Such, however, seems to be the general law.

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JUSTIFIABLE HOMICIDE — KILLING A THIEF. — The defendant in a recent Texas case hired a seeming tramp, so his own testimony runs, to help him gather a crop. The conversation and conduct of the new acquisition soon suggested to the master the probability that his servant was a horse-thief; whereupon he determined, on the night of the expected transaction, to keep watch with a double-action pistol.

An hour after the watch began a man appeared, leading one of the defendant's mares from the pasture. When the defendant shouted to the thief to "hold up," the latter slipped the halter from the animal's

neck, and, according to the defendant's testimony, advanced toward him. The defendant fired five times, and the thief died soon after.

The jury, instructed to find the prisoner guilty if they believed the theft was committed and the thief was fleeing from the place, brought in a verdict of murder in the second degree.

An appeal was then brought, and it turns out that under the Texas idea of justifiable homicide the verdict cannot stand. The court below erred in refusing an instruction, asked by the defendant, that if the deceased were within gunshot of the place where he had stolen, the shooting was justifiable, no matter how completely he had abandoned the property or how desperately he was attempting to flee. The code expressly puts among the exceptions to the rule that the killing must take place before the offence has been committed, the following: "In case of burglary and theft by night the homicide is justifiable at any time while the offender is in the building or at the place where the theft is committed, or is within reach of gunshot from such place or building."

Perhaps an adequate criticism of this remarkable way of discouraging theft is suggested in the court's quiet remark that "This statute of ours, in so far as this and other enumerated exceptions are concerned, is an invasion upon the rule of the common law, and is, so far as we know, *sui generis*."

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# THE LAW SCHOOL.

## LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

REPUDIATION OF CONTRACTS. — (*From Professor Williston's Lectures.*) — The point at issue is this: Suppose a contract between A and B by which B contracts to sell land to A on December 1; if A before that time erects a house on it, which A contracts to do, now in case B on November 1 notifies A that he will not carry out his contract, what are A's rights? Is he entitled to sue B *immediately*, alleging as a breach the failure of B to perform?

It would seem that B was not bound to perform his promise to convey the land until after he had received performance of the condition precedent.

Two views are open: (1) The first, which has the weight of authority on its side, is that the notice operates as a repudiation of the contract, and that A may treat this as a breach of contract just as if B had failed to perform, and may sue for this breach; (2) The second view treats the case as analogous to prevention by B of performance of a condition precedent, and the breach should be laid on the implied covenant by B to receive A's performance or not to prevent it.

Now when B on November 1 announces that he will not perform his promise on December 1, what constitutes the breach of contract? The announcement alone is not the essential thing. B has a perfect right to say whatever he likes, provided he is ready to perform on the appointed day. But a change in the situation comes if A *acts* on the refusal; that is, as soon as B has really prevented A's performing his